231606

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35582

PETITION OF RAIL-TERM CORPORATION
FOR A DECLARATORY ORDER

OPPOSITION OF AMERICAN TRAIN DISPATCHERS ASSOCIATION TO PETITION FOR A DECLARATORY ORDER

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IDENTITY AND INTEREST OF PARTY

The American Train Dispatchers Association ("ATDA") is a national labor organization whose membership is comprised of individuals employed by rail carriers to dispatch and control the movement of trains over most of the nation's interstate rail system. The ATDA is the exclusive collective bargaining representative under the Railway Labor Act (45 U.S.C. § 151 *et seq.*) for train dispatcher employees on most of the nation's major rail carriers.

Rail-Term Corp. ("Rail-Term") is an entity that contracts with a number of railroad clients to perform train dispatching services that otherwise would be performed by employees of rail carriers themselves. Attempts by Rail-Term and other contractors to perform these services outside the purview of the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*, ("RRA") and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*, ("RUIA") and the associated jurisdiction of the Railroad Retirement Board ("RRB"), threaten the viability of the RRA and RUIA system which covers all other employees in the country who perform transportation services for the nation's railroads and which Congress decided was essential to the nation's economy. Attempts by contractors, such as here, to use the authority of the Surface Transportation Board ("STB" or "Board") to escape the application of the RRA and RUIA by the RRB likewise threatens the statutory scheme.

ATDA was an amicus in the Court of Appeals proceeding that led to the filing of Rail-Term's Petition. It files this brief because its members have a vital interest in assuring that contractors and their employees who perform train dispatching services integral to the interstate transportation of passengers and freight are covered by the same laws and regulations that apply to the carriers' own dispatchers when they are providing the exact same services.

BACKGROUND

Train dispatching is a highly safety-sensitive responsibility that is directly related to assuring the safe and efficient movement of trains, and the protection of track workers and signalmen, throughout the national interstate rail network. As described by the Federal Railroad Administration:

> Dispatchers actually steer the train by remotely aligning switches. They determine whether the train should stop or move, and if so, at what speed, by operating signals and issuing train orders and other forms of movement authority or speed restriction. In addition, dispatchers protect track gangs and other roadway workers from passing trains by issuing authorities for working limits. Train crews on board locomotives carry out the dispatchers' instructions and are responsible for actually moving the train, but dispatchers make it possible to do so safely.

"U.S. Locational Requirement for Dispatching of U.S. Rail Operations", 67 Fed. Reg. 75939 (December 10, 2002).

For the most part, the railroads themselves employ the train dispatchers who are in direct contact with train and engine crews on freight and passenger trains that traverse this network. The railroads are covered entities under the ICCTA, and covered employers under the RRA.

In a few cases, a railroad that retains the responsibility for assuring safe train operations engages a contractor which provides the employees who perform the train dispatching for the railroad. This is such a case. From its offices in Rutland, Vermont, Rail-Term supplies its client railroads with dispatching service necessary for a railroad's day-to-day, minute-by-minute movement of freight. Dispatchers receive their daily directions as to train schedules, operations and restrictions from Rail-Term's Director of Operations who, in turn, receives directions from the operations managers of Rail-Term's customers. Rail-Term dispatchers authorize its carrier customers' personnel to occupy or vacate track. In short, rather than use their own employees to

provide "mission-critical"[1] train dispatching and rail traffic control, some railroad carriers have entrusted their own train dispatching functions to Rail-Term for it to dispatch and control their trains.

On April 6, 2010, the RRB determined that Rail-Term is an "employer" subject to the RRA and RUIA, and that Rail-Term employees may be considered employees of the carriers for the purposes of the Acts. Rail-Term Corp., B.C.D. 10-33 (April 6, 2010) (hereinafter "Rail-Term I"). The RRB later affirmed its decision. Employer Status Determination – Decision on Reconsideration, Rail-Term Corporation B.C.D., 11-14 (January 28, 2011) (hereinafter "Rail-Term II"). The basis for the RRB's decision was that Rail-Term was a "carrier by railroad subject to the jurisdiction of [the Board]" under 45 U.S.C. § 231(a)(1). Applying the standards the RRB has developed pursuant to its own statutory grant of authority, it determined that Rail-Term is a covered employer under Section 1(a)(1) of the RRA because it acts on behalf of its customers to perform dispatching and, as such, has the "ultimate" control over the movement of its clients' trains. "Because no railroad can fulfill its common carrier obligations unless its trains move, the work of the dispatcher is an integral part of the operation of a common carrier." Rail-Term I, p. 6.

Rail-Term petitioned the U.S. Court of Appeals for the D.C. Circuit to review that determination. The Court stayed that petition "to allow Rail-Term to petition [this] Board for a declaratory order on the question whether Rail-Term is a 'rail carrier' under 49 U.S.C. 10102(5)." Rail-Term now seeks a ruling from the Board that it is not a "rail carrier" under that section of the ICC Termination Act, Public Law No. 104-88, 109 Stat. 803 (1995), so as to avoid

[1] Rail-Term advertises on its website that it "provide[s] custom service solutions to railway operators who wish to outsource *mission-critical* activities, such as terminal management, traffic and signal maintenance and dispatch services. . . ." www.railterm.com; (accessed January 2, 2012). Emphasis added.

its obligations under the RRA and RUIA. This petition should be rejected because the dispatching services it provides fall within the Board's jurisdiction over "transportation by rail carrier" as defined in the ICCTA.

ARGUMENT

RAIL-TERM'S PETITION FOR A DECLARATORY ORDER SHOULD BE DENIED

Introduction

The ICC Termination Act ("ICCTA" or "the Act") vests this Board with jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a). Section 10102(5) defines "rail carrier" as "a person providing transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation". 49 U.S.C. § 10102(5). Section 10102(9) defines "transportation" to include

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard property, *facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use*; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property

49 U.S.C. § 10102(9). Emphasis added.

Taken together, these definitions mean that a rail carrier is not just a railroad proper, it is also any entity providing for compensation a facility, instrumentality, or equipment of any kind related to the movement of property by rail. The Board's jurisdiction "attaches to such transportation that is part of the interstate rail network." Herzog Transit Services v. United States Railroad Retirement Board, 624 F.3d 467, 473 (7th Cir. 2010) ("Herzog").

Rail-Term's Petition argues that Rail-Term is not a "rail carrier" under the ICCTA because its services are not "transportation" by a rail carrier subject to the Board's jurisdiction. Plainly, this argument must be rejected because train dispatching services clearly do constitute transportation by rail carrier under the Act. First, it is beyond doubt that the dispatching services provided by Rail-Term constitute a service related to the movement of passengers or property under Section 10102(9). The integral role of dispatching in the interstate rail network forecloses any argument to the contrary. Second, Rail-Term admits that it provides its services to common carrier railroads that would otherwise be handling the dispatching in-house. See Petition at 3-4 ("In effect, Rail-Term's rail carrier clients have 'outsourced' to Rail-Term the dispatching functions that they could otherwise provide 'in house'"). To do so, it maintains a facility that contains equipment that enables it to directly control customer railroads' rail traffic. That brings it within subsection (A) of Section 10102(9)'s definition of transportation. And because dispatching services are necessarily "related to that movement" and, as Rail-Term acknowledges, otherwise must be handled by railroads themselves, those services are encompassed by subsection B of Section 10102(9). As such, Rail-Term is "a person providing common carrier railroad transportation" under Section 10102(5). Therefore, because Rail-Term's dispatching services constitute "transportation by rail carrier" under the ICCTA, the Board's jurisdiction encompasses Rail-Term.

A. The Board's Jurisdiction Over Transportation By Rail Carrier Extends to Rail-Term's Dispatching Services.

1. Rail-Term Provides "Transportation" As Defined by the Act.

Dispatching services clearly fall within the Act's definition of transportation both as "a facility, instrumentality, or equipment of any kind related to the movement of passengers or

property" and as a "service related to the movement of passengers or property".[2] As the RRB explained in finding that Rail-Term was an employer under the RRA,

> Until properly dispatched, the engineer cannot begin movement of the train. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation.

Rail-Term, p. 4. Indeed, Rail-Term itself describes its dispatching services as "mission-critical" to its railroad customers.[3] The Seventh Circuit, upholding the RRB's decision in a virtually identical case, agrees that "[d]ispatching services are a necessary part of the operation of any train, including interstate trains." Herzog, 624 F.3d at 476.

In Herzog, the Seventh Circuit placed particular emphasis on the degree to which dispatching is regulated by federal transportation agencies such as the Federal Railroad Administration ("FRA"). Id. The nation's train dispatchers are subject to uniform rules and regulations imposed by Congress and federal agencies. For example, the FRA has issued regulations explaining that

> to *dispatch* means, by the use of an electrical or mechanical device –
>
> (i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or
>
> (ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

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[2] Rail-Term does not appear to contest that the provision of dispatching constitutes transportation under the ICCTA, focusing instead on its argument that it is not a "common carrier". However, as will be demonstrated below, an entity that provides services related to the movement of passengers or property is subject to the jurisdiction of the Board regardless of whether it is itself a common carrier.

[3] See Note 1, *supra*.

(iii) To issue an authority for working limits to a roadway worker.

49 C.F.R. § 241.5.

In addition, the FRA also has determined that rail employees controlling rail traffic in the United States must be located in the United States. United States Locational Requirement for Dispatching of United States Rail Operations, 49 C.F.R. Part 241. They are covered by the Federal Employees Liability Act, 45 U.S.C. § 51 *et seq.*, in the event they are injured at work. The federal Hours of Service Act, 49 U.S.C. § 21105, limits the number of hours that employees engaged in train dispatching may work in any 24-hour period. The Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331, subjects them to federally-imposed mandatory drug testing requirements.

This Board treats dispatching with similar importance. For instance, in determining whether it must exercise its jurisdiction under 49 U.S.C. § 11323 to approve a transaction involving the consolidation, acquisition or merger of control of a railroad, one of the primary considerations examined is the entity performing dispatching. See, e.g., Los Angeles County Transportation Commission – Petition for Exemption – Acquisition from Union Pacific Railroad Company, 1996 WL 408632 (S.T.B. 1996). Specifically, the Board looks at whether the transaction impacts the continued ability to meet the common carrier responsibilities, of which dispatching is a key component. Id. at 2 ("In determining how the operating agreement affects the vendor's ability to meet its common carrier obligation, we look at all relevant factors, such as . . . control over dispatching.").

Based on the foregoing, it is clear that dispatching is a "service related to the movement of persons or property" such that it is "transportation" under the Act.

2. Rail-Term is a Rail Carrier Under the Act.

Under long-standing Board (and I.C.C.) precedent, an entity is considered to be a rail carrier so long as the service being provided is part of the "total rail common carrier service that is publicly offered." Assoc. of P&C Dock Longshoremen v. The Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 290-95 (1992) (P&C Dock). See also Town of Babylon & Pinelawn Cemetery--Petition for Declaratory Order, F.D. 35057, 2008 WL 275697 (S.T.B. Jan. 31, 2008) ("the term 'transportation' has been defined expansively." At n. 8, reiterating and applying the standards established by the I.C.C.). In P&C Dock, the entity in question was under contract to provide stevedoring (loading and unloading) services to a single railroad (B&LE). P&C Dock argued, just like Rail-Term here, that it did not hold itself out to the general public because it provided its services by contract solely to B&LE.[4] The I.C.C. rejected that argument, finding that the railroad offered the stevedoring services provided by P&C Dock as part of its common carrier rail transportation service. Id.

The dispatching services offered by Rail-Term are a necessary and integral part of the common carrier railroad service sold by Rail-Term's customers to the general public and, therefore, are by necessity offered as a part of the "total rail common carrier service that is publicly offered." As stated by the Seventh Circuit, "Interstate rail carriers can, and often do, undertake to perform [dispatching] themselves and, when they incur such an expense, can no doubt charge for it." Herzog, 624 F.3d at 476. Indeed, Rail-Term admits that its dispatching services would be performed by those railroads if not for its contract services. Therefore, under established Board precedent Rail-Term is holding out its services via its railroad clients. For substantially the same reasons, the Seventh Circuit held that the RRB had "correctly determined"

[4] While P&C Dock provided its services only to one carrier, B&LE, Rail-Term provides its services to multiple railroads.

that an entity providing dispatching services was subject to the jurisdiction of the Board – and thus a covered employer under the RRA. Id. at 478.

Moreover, the only Board decision cited by Rail-Term that finds that an entity was not a rail carrier illustrates the point. In H&M International Transportation, Inc. – Petition for Declaratory Order, 2003 WL 22674651 (S.T.B. 2003) ("H&M"), the Board considered whether H&M, a company primarily involved with the operation of warehousing and other facilities throughout the United States, was a rail carrier under the Act. At one of its facilities, the company operated leased switch engines to load and unload trailers and containers. The Board determined that H&M was not engaged in common carrier transportation because it was not holding itself out to the public offering the services it engaged in with the leased switch engines. Rather, the Board found that "any rail-related activity performed by H&M is strictly in-plant, for H&M's convenience and benefit, and in furtherance of its non-rail primary business purpose."

By contrast, Rail-Term's rail-related activity is strictly for the convenience and benefit of its common carrier railroad clients, and in furtherance of *their* primary rail business purpose. Just as in P&C Dock, Rail-Term's services are being offered for the railroad clients as part of the total common carrier service they hold out to the public. Unlike in H&M, the transportation services being provided are integral to common carrier transportation outside the confines of Rail-Term's own business.

Finally, Rail-Term's reliance on cases defining "common carriage" is simply misplaced. In SMS Rail Service, Inc., STB FD 34483 (January 24, 2005), SMS was an acknowledged rail carrier involved in a dispute with Norfolk Southern over whether certain services SMS provided a location where both carriers operated were "common carriage" so as to entitle SMS to certain additional rights in connection with interchanging with NS. NS unsuccessfully argued that SMS

was only a "contract switching carrier" at the location which did not enjoy the statutory protection SMS sought. The Board's decision is limited to the peculiar facts of that situation and has no analogous relevance here. Similarly, B. Willis, C.P.A., Inc., STB FD 34103 (July 26, 2002), turned on whether Board approval was required for construction of a particular line of track by a state utility on land formerly owned by Willis but obtained by the utility via eminent domain to provide rail access to a utility plant. Willis too has no precedential value here.

CONCLUSION

ATDA respectfully requests that the Board deny Rail-Term's Petition for a Declaratory Order and hold that Rail-Term is indeed a rail carrier under ICCTA Section 10102(5) subject to the jurisdiction of the Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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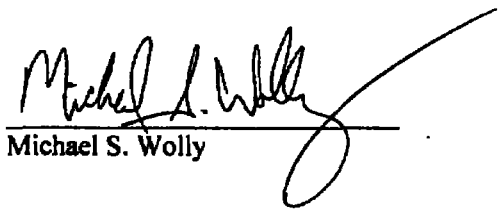

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